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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 816.

DEWITT C. FARRELL, ANDREW W. PINKNEY, AND JOHN B. SMITH, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 5, 1878.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the judges thereof, on Monday, the eighth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third.

WILLIAM H. BRADLEY,
Clerk.

THE UNITED STATES OF AMERICA
vs.
DE WITT C. FARRELL, ANDREW W. PINKNEY, AND JOHN B. SMITH. } Debt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 12th day of April, A. D. 1872, a writ of summons issued out of the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, against said defendants, in said entitled cause, which said writ, with the return of the
2 marshal endorsed thereon, is in the words and figures following, to wit:

Writ of Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, *Northern District of Illinois*, } *ss:*

The United States of America to the Marshal of the northern district of Illinois, greeting:

We command you to summon De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of May next, to answer unto the United States of America in a plea of debt of thirty-three thousand dollars, and for the detention of said debt to their damage, as they allege, of thirty-three thousand dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United states of America, at Chicago aforesaid, this twelfth day of April, in the year of our [SEAL.] Lord one thousand eight hundred and seventy-two, and of our Independence the 96th year.

WM. H. BRADLEY,
Clerk.

I served the within writ by reading the same to and in the presence and hearing of De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith, on the 17th day of April, A. D. 1872.

B. H. CAMPBELL,
U. S. Marshal.
By L. O. GILMAN,
Deputy.

(Endorsed): Filed April 19th, A. D. 1872.
WM. H. BRADLEY,
Clerk.

Afterwards, to wit: On the 6th day of May, A. D. 1872, the said plaintiff, the United States of America, by J. O. Glover, Esq., its attorney, filed in said clerk's office its declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

Circuit Court of the United States of America for the northern district of Illinois, of the March term of said court, in the year of our Lord one thousand eight hundred and seventy-two:

The United States of America, plaintiffs in this suit, by Joseph O. Glover, the attorney of the United States for the northern district of Illinois, complain of De Witt C. Farrell, Andrew W. Pinkney, [and] John B. Smith, defendants in this suit, of a plea that the said defendants render unto the said plaintiffs the sum of thirty-three thousand dollars lawful money of the said United States, which the said defendants owe to and unjustly detain from said plaintiffs.

For that whereas the said defendants heretofore, to wit: on the thirteenth day of June, in the year of our Lord one thousand eight hundred and seventy, to wit: at Peoria, in the State of Illinois, and in the northern district of Illinois, by their certain writing obligatory, bearing date the day and year last aforesaid, sealed with their seals, and now shown to the said court, became held and firmly bound unto the said plaintiffs in the sum of thirty-three thousand dollars, for the payment whereof to the said plaintiffs the said defendants bound themselves, their heirs, executors, and administrators, jointly and severally, firmly by these presents.

And the said plaintiffs further say that the said writing obligatory was and is subject to a certain condition thereunder written, whereby it was provided, among other things, to the effect following; that is to say, that if the said Farrell, his heirs, execu-

tors, or administrators should well and truly pay, or cause to be paid, unto the collector of internal revenue for the 5th collection district of Illinois the amount of taxes due and owing on the
5 following described distilled spirits, to wit: 499 barrels, numbered from 4,951 to 5,449, both numbers inclusive, containing 32,182 $\frac{89}{100}$ proof gallons, which were entered for deposit in the distillery warehouse, No. 6, of D. C. Farrell, at Peoria, in the 5th collection district of Illinois, on the 10th day of June, A. D. 1870, before such spirits should be removed from such warehouse and within one year from the date of said writing obligatory, then said writing obligatory should be void, otherwise it should remain in full force and virtue.

Yet the said plaintiffs in fact say that the said Farrell has not, nor has any other person, paid or caused to be paid the amount of said taxes before said spirits were removed from said warehouse, and within one year from the date of said writing obligatory: but, on the contrary, on 499 barrels of said spirits, numbered from 4,951 to 5,449 inclusive, containing 32,233 proof gallons, and subject to a tax of $16,116 $\frac{50}{100}$, no portion of said tax has been paid.

By reason of which said breaches the said writing obligatory became forfeited, and an action hath accrued to the said plaintiffs to demand and have of and from the said defendants the sum of thirty-three thousand dollars: yet the said defendants, although often requested so to do, have not as yet paid the said sum
6 of thirty-three thousand dollars, or any part thereof, to the said plaintiffs or otherwise, according to the said writing obligatory and condition, but to pay the same have hitherto wholly refused, and still do refuse, to the damage of the said plaintiffs of thirty-three thousand dollars, and therefore they bring their suit, etc.

J. O. GLOVER,
United States Attorney Northern District of Illinois.

Copy. (80.)

United States Internal Revenue Distiller's Warehousing Bond.

(To be given in duplicate to the collector on the first, eleventh, and twenty-first days of each month, or within five days thereafter.)

Know all men by these presents, That we, De Witt C. Farrell, of the city and county of Peoria, and State of Illinois, as principal, and Andrew W. Pinkney and John B. Smith, both of city and county of Peoria, and State of Illinois, as sureties, are held and firmly bound unto the United States of America in the full and just sum of thirty-three thousand dollars money of the

United States; to which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators firmly by these presents.

7 Sealed with our seals and dated this 13th day of June, A. D. 1870.

The condition of the foregoing obligation is such that if the above bounden principals, or either of them, or either of their heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto the collector of internal revenue, for the 5th collection district of Illinois, the amount of taxes due and owing on the following described distilled spirits, to wit: 499 barrels, numbered from 4951 to 5449, both nos. inclusive, containing $32182\frac{89}{100}$ proof gallons, which were entered for deposit in the distillery warehouse, No. 6, of J. C. Farrell, at Peoria, in the 5th collection district of Illinois, on the 10th day of June, A. D. 1870, before such spirits shall be removed from such warehouse, and within one year from the date hereof, then this obligation shall be void, otherwise, to remain in full force and virtue.

Int. Rev. Stamp, cancelled. 25 cts.

DE WITT C. FARRELL, [SEAL.]
ANDREW W. PINKNEY, [SEAL.]
JOHN B. SMITH. [SEAL.]

Signed, sealed and delivered, in presence of—
JOHN F. LUTHER,
THOMAS A. GRIER.

The following instructions must be particularly observed and complied with, viz:

1st. The christian name must be written in the body of the bond in full, and so signed to the bond.

2d. The residence of each signer must be stated in the

8 bond.

3d. A seal of wax or wafer must be attached to each signature.

4th. Each signature must be made in the presence of two witnesses, who must sign their names as such.

5th. There must be at least two sureties, and the bond must be dated.

6th. The sufficiency of the sureties must be shown by affidavits made on Form 33.

7th. A twenty-five cent stamp must be affixed and canceled.

8th. The penal sum named in the bond should be double the amount of the tax on the spirits.

(Endorsed.) Filed May 6, 1872.

WM. H. BRADLEY, *Clerk.*

Afterwards, to wit: On the 14th day of May, A. D. 1872, said defendants, by their attorneys, filed in said clerk's office their plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit Court of the United States, May term, 1872.

UNITED STATES OF AMERICA
vs.
DE WITT C. FARRELL, ANDREW W. PINKNEY, and JOHN B. SMITH. } Debt.

And the said defendants, by Gondy and Chandler, their attorneys, come and defend the wrong and injury, when, &c., and say that the said supposed writing obligatory is not their deed, and of this they put themselves upon the country, &c.

GONDY AND CHANDLER,
Attorneys for Defendant.

And the plaintiffs do the like.

By J. O. GLOVER,
U. S. Attorney.

And for further plea, the said defendants say that they do not owe to the said plaintiff the said sum of money above demanded, or any part thereof, in manner and form as by the said declaration is above set forth, and of this they put themselves upon the country, &c.

GONDY AND CHANDLER,
Attorneys for Defendant.

And the plaintiffs do the like.

By J. O. GLOVER,
U. S. Attorney.

(Endorsed.) Filed May 14, 1872.
WM. H. BRADLEY, *Clerk.*

Afterwards, to wit: On the 21st day of June, 1872, in the adjourned May term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

10 THE UNITED STATES OF AMERICA
vs.
DE WITT C. FARRELL *et al.* } Debt.

By the agreement of the parties, by their attorneys, it is ordered that this cause be referred to Henry W. Bishop, Esq., one of the masters of this court, to take proof herein, and report the same to the court.

Afterwards, to wit: On the 30th day of April, A. D. 1878, in the adjourned March term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
DE WITT C. FARRELL *et al.* } Debt.

Now comes the district attorney, and now come also the defendants, by their attorney, and upon issue joined upon the plea of the defendants filed herein by the agreement of the parties, by their attorneys, they waive the intervention of a jury, and for trial put themselves upon the court, and after hearing the evidence and the arguments of counsel the court takes the same under advisement.

Afterwards, to wit: On the 8th day of July, A. D. 1878,
11 in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

THE UNITED STATES OF AMERICA
vs.
DE WITT C. FARRELL, ANDREW W. PINKNEY, and JOHN B. SMITH. } Debt.

The court having considered, and being now fully advised upon the matters heretofore submitted herein, finds the issue for the plaintiffs, and finds their debt in the sum of thirty-three thousand dollars, and assesses their damages to the sum of fifteen thousand five hundred and five dollars and twenty-seven cents.

It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendants the said sum of thirty-three thousand dollars, their debt so as aforesaid found, and that they have execution therefor, to be satisfied and discharged upon the marshal making thereon the said sum of fifteen thousand five hundred and two dollars and twenty-seven cents, their damages, together with their costs and charges in this behalf expended, amounting to three hundred and thirty-seven dollars and seventy-four cents.

12 And on the same day, to wit: the 8th day of July, A. D. 1878, on the trial of said cause, the following exceptions

were taken and allowed by the court, and made of record in said entitled cause, in the words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States for the Northern District of Illinois.

THE UNITED STATES OF AMERICA *vs.* DE WITT C. FARRELL, ANDREW W. PINKNEY, and JOHN B. SMITH.	In Debt.

Be it remembered that on the trial of the above-entitled cause at this term the plaintiffs, to maintain the issues on their part, read in evidence to the court a certain stipulation, in the words and figures following; that is to say:

In the Circuit Court of the United States for the Northern District of Illinois.

THE UNITED STATES OF AMERICA *vs.* DE WITT C. FARRELL, ANDREW W. PINKNEY, and JOHN B. SMITH.	Debt, $33,000. Damages, $33,000.

It is stipulated and agreed by and between the parties to this suit that the facts therein are as hereinafter set forth, and that this stipulation shall be used on the trial thereof, and
13 shall be considered, and shall be evidence in said case, and shall take the place of and be in lieu of parol evidence of the facts herein stated; but nothing in it shall "prevent either " party from giving further evidence in said cause, if either party " shall deem it necessary. This suit is brought on a bond, dated " June 13th, 1870, in these words and figures, to wit:

"United States internal revenue distiller's warehousing bond, " (to be given in duplicate to the collector on the first, eleventh, " and twenty-first days of each month, or within five days there- " after.)

" Know all men by these presents: That we, De Witt C. Far- " rell, of the city and county of Peoria, and State of Illinois, as " principal, and Andrew W. Pinkney, and John B. Smith, both " of city and county of Peoria, and State of Illinois, as sureties, " are held and firmly bound unto the United States of America, " in the full and just sum of thirty-three thousand dollars, " money of the United States, to which payment well and truly " to be made, we bind ourselves, jointly and severally, our joint " and several heirs, executors, and administrators, firmly by " these presents.

" Sealed with our seals, and dated this 13th day of June, A. " D. 1870.

" The condition of the foregoing obligation is such that if the " above bounden principals, or either of them, or either of
14 " their heirs, executors, or administrators, shall well and " truly pay or cause to be paid unto the collector of in- " ternal revenue, for the 5th collection district of Illinois, the " amount of taxes due and owing on the following described dis- " tilled spirits, to wit: 449 barrels, numbered from 4951 to " to 5449, both numbers inclusive, containing 32,182 $\frac{89}{100}$ proof " gallons, which were entered for deposit in the distillery ware- " house, No. 6, of D. C. Farrell, at Peoria, in the 5th collection " district of Illinois, on the 10th day of June, A. D. 1870, before " such spirits shall be removed from such warehouse, and within " one year from the date hereof, then this obligation shall be " void, otherwise, to remain in full force and virtue."

Int. Rev. Stamp, cancelled. 25 cts.

DEWITT C. FARRELL, [SEAL.]
ANDREW W. PINKNEY, [SEAL.]
JOHN B. SMITH. [SEAL.]

Signed, sealed and delivered, in presence of—
JOHN T. LUTHEY,
THOMAS A. GRIER.

Which said bond was executed under and in pursuance of the 23d section of an act of Congress entitled " An act imposing taxes on distilled sprits and tobacco, and for other purposes," approved July 20, 1868. The Government sues for $16,116 $\frac{50}{100}$, taxes claimed to be due and not paid on 449 barrels, containing 32,233 taxable gallons of distilled spirits, being the same
15 mentioned in the condition of said bond which were entered for deposit under the provisions of said act, at the following dates:

June 4, 1870, 100 barrels, serial numbers 4951 to 5050, containing 6,380 39 proof gallons.

June 6, 1870, 74 barrels, serial numbers 5051 to 5124, containing 4,788 15 proof gallons.

June 7, 1870, 68 barrels, serial numbers 5125 to 5192, containing 4,283 29 proof gallons.

June 8, 1870, 84 barrels, serial numbers 5193 to 5276, contain- 5,457 96 proof gallons.

June 9, 1870, 85 barrels, serial numbers 5277 to 5361, contain ing 5,467 74 proof gallons.

June 10, 1870, 88 barrels, serial numbers 5362 to 5449, containing 5,805 36 proof gallons, in the distillery warehouse, No.

6, of De Witt C. Farrell, at Peoria, in the 5th collection district of Illinois, recited in said bond as having been entered on the 10th day of June, 1870, by the defendant, De Witt C. Farrell, on which the taxes due the United States have not been paid.

The defendants claim, and the plaintiff admits, that on the 27th day of July, A. D. 1870, and while said distilled spirits were in said distillery bonded warehouse, No. 6, in charge of a United States store-keeper, under and in pursuance of the
16 terms and provisions of said act of Congress, a fire commenced in a frame building belonging to a company known as the Peoria Paper Company, and thence to the distillery of George Spurck & Co., and communicated with the distillery of said De Witt C. Farrell, and his said bonded warehouse No. 6, and entirely destroyed the same and the contents of the said warehouse, including the said 499 barrels of distilled spirits; and that said fire was not caused by any act, omission, fault, neglect, carelessness, intent or evil practice of the said defendants, or either of them.

It is further stipulated that the defendants may give in evidence under the pleas on file in said cause any matter that they or either of them could, if such matter was specially set up by way of plea.

Dated this 31st day of January, 1878.

MARK BANGS,
United States Attorney for the Northern District of Illinois.
S. D. PUTERBAUGH,
Attorney for Defendant.

(Endorsed.) Filed Feb. 7th, 1878.
WM. H. BRADLEY, *Clerk.*

17 The plaintiff here rested, and offered no further evidence in the case.

The defendants, to maintain the issues on their part, offered and read in evidence certain depositions taken at Peoria, Illinois, on the 5th day of February, 1878, pursuant to a commission regularly issued from this court in this cause for that purpose, which said depositions are in substance as follows:

John F. Luthey, of Peoria, U. S. gauger, testified:

During the year 1870 was book-keeper for D. C. Farrell. Was present at the fire which destroyed his distillery and bonded warehouse, July 27th, 1870: was there looking after his interests in any way I could. The fire originated in a paper mill about a quarter of a mile southwest of the distillery: from there it spread north, on account of the strong wind that was blowing. Think the day was hot, and the weather had been very dry: the buildings were very dry and very easy to be ignited. Think it was not over half an hour from the first alarm of fire until pretty much all the buildings had caught fire. There was a heavy wind blow-

ing, and the sparks were flying pretty thick, and communicating fire to other buildings. Think the fire occurred between twelve and one o'clock in the afternoon. I was not there at the time the fire caught, but was living not over four or five blocks from the distillery, and got there shortly after it commenced.

18 Was one of the first that got there; was there within ten, probably five, minutes after the alarm was sounded. On the side of Farrell's distillery, towards Spurck's house, there was a large tub full of water, which we expected to use in case of a fire, and right by it was a door, and inside of that we had hose lying. Think I had got the hose in shape the day before ready to attach; and when I got there I opened the door, got out, and attached the hose, some others helping me; don't know who they were; there were two or three others there; but I found that during the time we had suspended operations at the distillery the water had got low, and would not throw with any pressure. It ran a little, but not to amount to anything. At that time the distillery had been shut down probably a month; could not say positively how long. Joseph Redmon was there; think he went down with me. He had been foreman of the distillery. Don't know whether he was at that time; think not. C. C. Boring was there, and the teamster, Mike Quinn, and, I think, John Hill. The employés of the distillery and others there made every effort possible to check and put out the fire. Some of them were on the cattle-pens with brooms, I think, and they were carrying water in buckets and trying to put out the fire. Several of them were up on the bonded warehouse. The warehouse was at the time in charge of the U. S. storekeeper,

19 Seth Griffin. He was not there when the fire occurred. There was no way of getting into the warehouse, as he had the key. To the best of my recollection, the storekeeper got there about half an hour after the fire commenced. Think he had gone to his dinner. I knew about where he lived; it was about two miles from the distillery. When the distillery was running he generally brought his dinner with him; but at that time he went home to dinner, and I think he was generally gone about two hours. Don't know what time he left the premises that day. Nobody in the employ of the Government was left in charge of the warehouse during the absence of the storekeeper. Don't recollect what kind of lock they had on the warehouse at that time. Nobody but the storekeeper, Mr. Griffin, had access to the warehouse. I think no one was allowed to enter, or could have entered the building in his absence. Some of the high wines could have been saved if the storekeeper had been there when the fire first broke out; that is, if he had known at the time when the fire started that the buildings were going to be consumed. I don't know, but it is my best judgment that after

it became evident that the buildings and property were going to be destroyed, no part of the high wines could have been saved, if the storekeeper had been on the ground ready to open the door, and opened the door. When it was known, or when we
20 saw, that the buildings were going to burn, it was too late to do anything. It took but a very short time—probably not fifteen minutes—from the time the buildings caught fire till they were pretty much burned down. The situation of the warehouse was such—the ground sloping towards the river—that any wines we got out would have had to be carried up hill or rolled into the river. We rolled out a number of barrels—probably a hundred, or two or three hundred—into the river, but they all were burned; but if we had known, of course, what we saw afterwards we could have saved some of them. The plat marked exhibit 1 is a correct representation of the premises, so far as I can see. I think there were 2005 barrels of high wines in the warehouse at the time. They were all destroyed except five barrels.

C. C. Boring, Peoria, carpenter, now president of school board, testified:

From the beginning of 1870 until some time early in the spring I was employed at Farrell's distillery. Was not in his employ after that time. Remember the fire that destroyed the building, but do not remember the date. I believe it was between one and two o'clock that I heard the alarm of fire. Henry Rehder, Charles Hagel, and myself went down there. I think the three of us were together. When we got down where could see what was burning we saw it was Spurck's distillery and warehouse.
My best recollection is that when I got there the fire had
21 not touched Farrell's property at all, or, if it had, it had but just taken the cattle-pens between the two distilleries. There was quite a row of cattle-pens there. When I got to Farrell's distillery I don't think there were to exceed from seven to ten men there. I was among the first that got there. We thought at first we could save the building by saving the cattle-pens, or a portion of them, and we got the hose attached to the cold-water tubs, and did the best we could, but it did not do any good. The crowd gathered pretty fast. I left the deck of the fermenting floor and went around to the bonded warehouse, where quite a crowd had gathered around the door. Some person asked for admittance, for the door to be opened. Seth Griffin was the storekeeper. The door was not opened at that time, nor probably for fifteen or twenty minutes afterwards. Mr. Griffin was not there when I got there. The weather had been dry. It was a clear, warm day. The wind was either from the west or southwest. It came from the direction of Spurck's distillery. It took twenty minutes or more for the fire to come from Spurck's dis-

tillery to Farrell's. No person besides Griffin had any key to the warehouse, or any means of getting into it. I think it became the conclusion of all present about the time I got there that there was danger of the distillery and warehouse burning.

22 We saw that Farrell's cattle-pens were bound to burn, and and if they burned we did not consider that the mill could be saved at all. I believe it was apparent to all that were there that the property was actually in danger from the time the fire first took the pens. My recollection is some one asked Griffin to open the door; would not say positively. Had the door been opened when I first left the cattle-pens and went around to the bonded warehouse, with the number of men that were there, I think there could have been from five to six or probably eight hundred barrels of highwines taken out before the bonded warehouse took fire. They could have been taken directly to the beach, away from the warehouse, up the river. The warehouse was finally opened—say ten or fifteen minutes after I first saw Mr. Griffin. Don't know how long he had been there then. I knew Farrell's foreman there, Joseph Redmon. I saw him there endeavoring to save the property. He called me to his assistance to get the hose attached to the cold-water tub. He assisted in saving the books and papers from the office, and was at the warehouse door when I left the cattle-pens and went around to the bonded warehouse. I saw Mr. Luthey, the bookkeeper, there. He did all he could towards saving the wines and the property generally. I think all the men there did all that they could do.

23 I don't think they could have done anything more unless they had had other opportunities, unless the door had been opened. I should judge it was between four and five hundred feet from Spurck's distillery to Farrell's. There was nothing more than the fire to prevent the men from going from one place to the other. I don't think that after the cattle-pens took fire they could have passed directly from one distillery to the other. Think they would have had to make a considerable circuit to get up there. There was a cooper-shop just above Farrell's warehouse. It stood lengthwise to the river, and I think the end next the river, at low water, was probably from thirty to fifty feet from the river. It caught fire, I think, from the bonded warehouse. There was a large lot of cooper's timber piled up there, and I could not state whether the shop took fire first or the timber, but my impression is that the timber took fire first. I think the distillery and warehouse took fire before that did. Sparks and pieces of burning wood were flying all over that whole country there. Don't remember seeing any fire in the stave-yard or cooper-shop prior to the fire in the mill.

Cross-examined: If the door had been opened, and the spirits had been removed from that bonded warehouse, I do'nt know

where they would have put them. The door was on the river side; if they had got the spirits out of that door, and had
24 moved them up the river from the distillery, there was quite a long beach there. It was a long way from the bank down to the water; in all probability they would have saved the high wines. The cooper shop was above here, (indicating plat which shows that it was one hundred and seventy-one feet up the river from the bonded warehouse,) probably forty or fifty feet from the river. The cooper shop was burned up also; there was a ravine there, the cooper shop stood right on it; the basement of the shop down in the ravine, and the first floor level with the ground. The spirits would not have had to be moved across the ravine; the spirits could have been moved to the beach between the ravine and the bonded warehouse. Those spirits which they did get out of the warehouse were rolled into the river, I believe. I could not tell why that was done, unless it was in the hope of saving them; it was done in a hurry, and it was very convenient to start a barrel and let it roll into the river; after being rolled ten or twelve feet from the door it would roll of itself into the river. It would not have been necessary to roll the barrels up-hill to get them to the beach mentioned. It would have been on a level going from the warehouse, with a little descent to get upon this declining beach. In my judgment, if the spirits had been on this beach they would not have been burned, even taking into account the fact that
25 the cooper shop was burned also. If they had been rolled onto this beach they would have laid from fifty to seventy-five feet from the bonded warehouse, and probably about the same distance from the cooper shop. If I remember right, the wind changed after Farrell's property caught fire, and blew more towards the city than towards the river; I do'nt know that the store-keeper offered any other resistance to the removal of the spirits than to decline to open the door.

Joseph Redmon, Peoria, carpenter, testified:

I was in employ of Farrell, as foreman of his distillery, during the year 1870; was at the fire that took place July 27, 1870; was just finishing my dinner when I first discovered the fire; I suppose it was not quite one o'clock. The distillery was not in operation; I got to the distillery, with Luthey, within five minutes after I discovered the fire; the store-keeper, Griffin, was not there. Should think it was half an hour, or perhaps more, could not fix the time exactly, after we got there, before Griffin came; Griffin had charge of the warehouse, and nobody else had any way of getting into it, or had any right to get into it; it was considered under his charge. The doors were fastened with a Government lock; Griffin had the key. I at once gave

directions about attaching the hose, and then went to the warehouse, thinking perhaps Griffin would be there, and would
26 open the door; I went straight to the warehouse for the purpose of saving the wines. Griffin was not there, and I did not get in at that time. I did not feel that I had a right to open the door—might not be safe in doing it the way we understood the regulations. Griffin did not open the door as soon as he got there: an insurance man, Stevenson, said to me, "the "damned fool won't open the warehouse," or something like that. He wanted me to see Griffin: I called to Griffin, and he hesitated and then said, "you have as much right to open the "door as I have," or something like that. I told him he had the key, and had better unlock the door; he said, "do you "think it will burn up?" And I said, "I am sure of it." I can't tell now who finally opened the door: it strikes me it was broken in. I was not there when it was opened. If the storekeeper had been on the ground at the time the fire broke out, and it was known that it would reach the property, and had opened the door, I am sure the wines could have been got out—that is, a great quantity of them. It would have been quite a job to get the whole of them out. I think six or seven hundred or a thousand barrels, or something like that, could have been got out. I suppose they would have been safe on the beach, near the river. That is where I should have directed them to be put. I don't think anything more could have been done than was done by Mr. Farrell, or any one in his employ, to save the
27 wines. It was a remarkably warm day, and the wind was blowing from the southwest to the northeast, I think. The wind was blowing in such a way that there was no time that I know of but you could pass between the river and the fire, and for that reason, except where this whiskey ran down the bank and burned, the fire from the buildings would not have burned the whiskey if it had been put where I have stated, I think. It seems as if the fire carried up higher—the heat, I mean. There were from one hundred and thirty to one hundred and thirty-four barrels rolled out of the warehouse. They started for the river, and nearly all went in. It was all burned up with the exceptions of five barrels, that were partly saved. The buildings caught from sparks and boards burning and sailing over. According to my recollection, the shavings around the cooper-shop were burning before the warehouse burned: not a great while. The sparks were falling all around the cooper-shop. The shavings were burning before there was any fire to hurt us at the still-house. We had men on the warehouse and the distillery trying to keep off the fire, and the coopers were working to save the cooper-shop and stuff. The biggest portion of the cooper stuff was between the bonded warehouse and the cooper-shop, near the shop.

The fire would light on the stuff and on the shop. The
28 whole air was full of fire, and a man had to look out to keep from getting burned or hurt. There was nothing to prevent the barrels being rolled up on the bank, instead of rolling them into the river. It was done because the men were in a considerable hurry and confusion, and a man had considerable work on his hands to direct these men and have them put the whiskey where he wanted it. It was only the last whiskey that was got out that we could get them to understand where to put it. There were 2,005 barrels of whiskey in the warehouse at the time. Five barrels only were saved, and something lost out of the five, (5.) I think the storekeeper lived at least two miles from the warehouse. He almost always left the warehouse at noon and went home to his dinner, and left no one in charge. Sometimes would be gone an hour and a half, sometimes three hours. When we were not running the distillery he would take his time to it. Should think he was gone two hours and a half on the day of the fire. When I say that nothing more could have been done to save the highwines than was done I mean with the doors closed as they were. To have got out any more whiskey we should have had to commence sooner, and in that case there would not have been so many barrels burst and running down and burning the rest. The warehouse was full; any more
29 would have obstructed the passage-way. The barrels were piled in rows, two tiers high, and my notion was if we got out the portion of whiskey near the door, the whiskey in the back end of the warehouse would not have been so bad to get out. That could have been done if the doors had been opened when I got there. Should think from seven hundred to one thousand barrels could have been got out, judging from time we got out the others. I frequently said to the storekeeper that he prevented us from getting out the whiskey by not being there, but he said he got there as soon as he could. As to whether the whiskey would have burned in the river if it had been rolled there, my idea was that so much burning whiskey would not have run down. It was the whiskey that burned the whiskey; it followed the gutter—made a gutter for itself from the door down to the river. The whiskey was prevented from floating down the river by rows of stakes driven down where the coopers soaked their poles, and that caught the barrels that were rolled out. When the whiskey from the warehouse ran down on fire it set fire to the barrels in the river. The whiskey ran right on top of the water, burning as it went, and burned the barrels off down to the water, except the five (5) barrels. The burning whiskey extended over the water as far as two hundred feet, some
30 thought. The whole surface of the water there was on fire, a blue blaze mounting perhaps thirty or forty feet

high. The complaint was that it killed all the fish in the river around there.

Cross-examination: If we had got out a thousand barrels there would still have been a thousand barrels in the warehouse to burn and run into the river, anyway. There was a road that made a very good way to roll the whiskey towards that beach (indicating a point on the beach up the river,) but there were parties that got hold of it—that is the whiskey—to roll it, said they would roll it into the river where those hoop-poles were driven down, and they thought it would be safer. The high wines could have been rolled to that space between the cooper shop and the river after they were got out. There was quite a vacant and level piece of ground slanting off towards the river there. That would have held quite a quantity of whiskey. When the warehouse had burned down so the fire had got to the whiskey, the spirits ran down from the warehouse to the river, burning as it ran, and the flame was quite high, a strong wind blowing right up the river.

Re-direct examination: My idea was that if we had got out a quantity of the whiskey there would not have been so much to run down into the river to burn. If the doors had been
31 opened when we first got there we could have rolled the whiskey up under the bank, where it would have been sheltered some considerably from the fire. Any place along the side of the bank would have been perfectly safe from fire. The bank along up by the cooper shop was somewhat abrupt—more so than at the warehouse. Down below there was a space of beach where we could have piled the high wines where they would have been safe.

Re-cross examination: I don't think it would have caught fire there. I believe that any whiskey on the side of the bank below, between the water's edge and any place where the whiskey did not run against it, would have been safe. The storekeeper did not open the door; all he said to me, to amount to anything, was, "I have no right to open the door that I know of. You have as much right to open the door as I have." "Well," said I, "the house is going to burn, and I want to save as much as I can." "Well," he said, it was in the Government's hands. He is not a stubborn man. He wanted to do what was right, and all that was the matter was he did not know what was right. The greatest trouble was that he was not on hand to open the door; he was not there in time to save the whiskey.

Henry Rehder, Peoria, ship carpenter, testified:

My boat yard is about three blocks from where Farrell's
32 distillery was located in 1870. I was in my yard at work on the 27th of July, 1870, when the alarm of fire was given. I ran to Farrell's premises. I got there at the time the paper

mill was on fire. Mr. Boring, Redmon, and a man named Hazel were there at that time. I commenced getting Farrell's books out. The wind was blowing pretty hard, and I became satisfied that there was no chance to save the property. Mr. Boring had the hose out, but the fire was undermining him. We saved Farrell's books. I then saw the distillery of Spurcks tumbling in. I then proposed that we get the whiskey out of Farrell's warehouse. It was half an hour before the fire struck the warehouse. After leaving the office I ran down to the warehouse, taking some men with me. The door was locked, and no one was there to unlock it. There were from 50 to 100 men with me. I inquired for the storekeeper. We could not find him. At last he came. We had a big stick of timber, and were going to batter the door in. The storekeeper said, "I have a key, but I have no orders to open the door." This was half an hour after we got to Farrell's place. If the storekeeper had been there and opened the door when I first went there we could have got all the spirits out; we could have put it down on the river bank and in the river. If
33 we could have got it all out, there would have been no danger rolling it in the river. The reason why the whiskey in the river caught fire was that burning whiskey communicated with it from the warehouse. We could have had it all out if we had had the door open, but we could not get it open. We were afraid to break it open, because we did not know whether the house would take fire or not, but I said right off that there was no help but to take everything out. This was talked among the men. There was a hundred or more men there ready to assist in saving the property. It must have been over a half an hour before the storekeeper came down there. If he had been there all could have been saved. Everything was handy to roll it out, and as soon as it was got out of the door there was a little flat place, and from there it would have rolled down to the river, and there were men enough to handle it. The door was finally opened by some one, and I saw barrels rolling down towards the river, and I jumped into the river with three others, and rolled them out. There was only one door to the warehouse—a double sliding door.

The wind was blowing from the southwest, from the direction of Spurck's warehouse and the paper mill: it blew a little off from the river.

This was all the evidence introduced on the trial of said cause.

34 The Court thereupon found, as a matter of fact, that the high wines or distilled spirits, mentioned in the distillers' warehousing bond, sued upon, were entirely destroyed by fire, on the 27th of July, 1870, without any fault, negligence, or care-

lessness on the part of the said De Witt C. Farrell, or any person in charge of said distillery and bonded warehouse, in the employment of the said Farrell; that the spirits were so destroyed while in the bonded warehouse connected with said Farrell's distillery, and that said warehouse was in the charge of an internal revenue storekeeper.

The Court ruled, as matter of law, that the defendants were liable for the tax, notwithstanding the finding of the facts as aforesaid: to which ruling of the Court, on the law of the case, and to the decision of the Court, that the defendants are liable for the tax secured by the bond sued on, the defendants, by their counsel, then and there excepted. The defendants, by their counsel, thereupon asked the Court, upon the finding of facts as aforesaid, to render a judgment in favor of the defendants, which motion of the defendants the Court overruled; to which ruling of the Court the defendants, by their counsel, then and there excepted. The Court thereupon found for the plaintiffs, for the penal sum of the bond sued upon, in debt, and assessed the plaintiffs' damages at the amount of the tax
35 secured by the bond; to which finding of the Court, the defendants, by their counsel, then and there excepted. The defendants thereupon moved the Court for a new trial, on the ground that the Court had erred in the application of the law to the facts in the case, which motion the Court overruled: to which ruling of the Court, the defendants, by their counsel, then and there excepted. The Court thereupon entered judgment in favor of the plaintiffs, and against the defendants, for thirty-three thousand dollars, debt, and fifteen thousand five hundred and two $\frac{37}{100}$ dollars, damages, (to be discharged on payment of said damages, interests and costs:) to the rendering of which judgment the defendants, by their counsel, then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendants tender this their bill of exceptions, and pray that the same may be signed and sealed by the judge of this Court, which is done accordingly, this 8th day of July, A. D. 1878.

H. W. BLODGETT, [SEAL.]
Judge.

(Endorsed.) Filed July 8, 1878.
WM. H. BRADLEY,
Clerk.

And afterwards, to wit: On the 9th day of July, A. D.
36 1878, said defendants, by their attorneys, filed in said clerk's office their bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents, That we, De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith, as principals, and Thomas Neill and Zenas N. Hotchkiss, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of twenty thousand dollars, ($20,000,) to be paid to the said The United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this ninth day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately, on the eighth day of July, A. D. 1878, in the circuit court of the United States for the northern district of Illinois, in a suit depending in said court between the United States of America as plaintiffs and said De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith, as defendands, judgment was rendered in favor of said plaintiffs and against said defendants for the sum of thirty-three thousand dollars debt, and fifteen thousand five hundred and two dollars and twenty-seven
37 cents damages, besides costs of suit, to be satisfied on payment of damages, interest, and costs; and the said defendants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The United States of America, citing and admonishing said The United States of America to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, therefore, the condition of the above obligation is such that if the said De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

DE WITT C. FARRELL. [SEAL.]
ANDREW W. PINKNEY. [SEAL.]
JOHN B. SMITH. [SEAL.]
THOMAS NEILL. [SEAL.]
ZENAS N. HOTCHKISS. [SEAL.]

Approved.
H. W. BLODGETT,
Judge.

(Endorsed:) Filed July 9, 1878.
WM. H. BRADLEY,
Clerk.

38 NORTHERN DISTICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein The United States of America is the plaintiff and De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said [SEAL.] district, this tenth day of September, A. D. 1878, and of our Independence the one hundred and third.

WM. H. BRADLEY,
Clerk.

39 UNITED STATES OF AMERICA, *ss:*

To The United States of America, greeting:

You are here hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith are plaintiffs in error, and said The United States of America are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this ninth day of July, in the year of our Lord one thousand eight hundred and seventy-eight.

H. W. BLODGETT, [SEAL.]
Judge.

Due personal service upon me of a true copy of the foregoing citation is this day admitted.

MARK BANGS,
U. S. Atty.

CHICAGO, ILLINOIS, *July 9th*, 1878.

40 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America, to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition

of a judgment in a plea which is before you, in said circuit court, between the United States of America, plaintiff, and De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith, defendants, in an action of debt, a manifest error hath happened, to the great damage of the said De Witt C. Farrell, Andrew W. Pinkney, and John B. Smith, as by their complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1878, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eighth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 103d year.

[SEAL.] WM. H. BRADLEY,
Clerk.

Endorsed: Supreme Court of the United States. De Witt C. Farrell et als., plaintiffs in error, *vs.* The United States of America, defendants in error. Copy deposited for the defendants in error in the clerk's office U. S., northern district of Illinois, this 2d day of September, A. D. 1878.

WM. H. BRADLEY,
Clerk.

Endorsed on the cover: N. ILLINOIS, *C. C. U. S.:* No. 816. De Witt C. Farrell, Andrew W. Pinkney and John B. Smith, plaintiffs in error, *vs.* The United States. Filed 5th October, 1878.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1878.

DEWITT C. FARRELL, ANDREW W. PINKNEY and JOHN B. SMITH, *Plaintiffs in Error,*

—vs.—

THE UNITED STATES, *Defendant in Error.*

No. 816.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET.

1878.

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—vs.—

THE UNITED STATES, *Defendant in Error.*

No. 816.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

This is an action on a bond dated June 13, A. D. 1870, entered into by the defendants in pursuance of Section 23 of the act of Congress of July 20, 1868, entitled "An Act "imposing Taxes on Distilled Spirits and Tobacco, and "for other Purposes."

U. S. Stat. at Large, vol. 15, p. 125.

Its condition, omitting names, is as follows:

The condition of the foregoing obligation is such that if the above bounden, &c., shall well and truly pay, or

cause to be paid, unto the Collector of Internal Revenue for the 5th Collection District of Illinois, the amount of taxes due and owing on the following described distilled spirits, to wit: 499 barrels, numbered from 4,951 to 5,449, both numbers inclusive, containing 32,182 $\frac{89}{100}$ proof gallons, which were entered for deposit in the distillery warehouse No. 6 of D. C. Farrell, at Peoria, in the, &c., on the 10th day of June, A. D. 1870, before such spirits shall be removed from such warehouse, and within one year from this date, then, &c.

The Government sues for the tax on 32,233 taxable gallons of distilled spirits, mentioned in this condition, at fifty cents a gallon.

DeWitt C. Farrell, the principal obligor, was, at the time of giving the bond, a distiller at Peoria, Illinois, in the 5th Collection District of the State of Illinois, and as stated in the condition of the bond, deposited in the warehouse provided by him in pursuance of the 23d Section of the Act, on that day, distilled spirits in barrels, as in the bond specified, which distilled spirits, while in such bonded warehouse and in the possession of the Government, were destroyed by fire under the following circumstances: A paper mill at some distance (about a quarter of a mile) from the warehouse, took fire at about noon of the 27th of July, A. D. 1870. It was a clear and warm day; the wind was blowing briskly; there had been a dry period for some time previous, and the fire, after burning over the intermediate ground, caught the warehouse. This, at the time, was locked, and in charge of the Government store-keeper; but he had gone to his residence, two miles or more distant, for his dinner, leaving, as was his habit, the warehouse unwatched, and did not return to it till some half to three-quarters of an hour after it became apparent it would burn. Meanwhile a large number of persons had collected, and various ineffectual efforts had been made to put out the

fire, many persons being on the warehouse for that purpose. The distillery had been for some time closed, and the store-keeper usually remained away an hour or two when he left for his dinner.

The witness, C. C. Boring, who had been for fifteen or twenty minutes at the fermenting house trying to put out the fire, and had gone from there to the warehouse, says: "When I arrived, some person asked for admittance,— "for the door to be opened. Seth Griffin was the store- "keeper, but who it was that asked for it I don't know; "and neither do I remember Mr. Griffin's reply, but the "door was not opened at that time, nor, probably, for "some fifteen or twenty minutes afterwards, more or "less."

This witness swears that, if the door had been opened when he went there, he thinks probably eight hundred barrels of the highwines could have been taken out before the bonded warehouse took fire.

The witness, Redmon, after stating that it was half an hour, perhaps more, after he reached the ground before the store-keeper got there, the various efforts made to put out the fire, that the warehouse was locked, and that he did not go in because he had an idea, from the way the regulations stood, that he had no right to break in the door, continued: "When he (the store-keeper) first came on the "ground, I had went to the office and had met Stevenson, "and I don't recollect the other insurance men's names, "coming together in the yard as I was going towards the "office, and I met Mr. Griffin in the lane or road just "around the barn at the same time, and I said to the in- "surance men, 'there comes Mr. Griffin now; see him as "quick as you can.' They had, however, spoken to me "about breaking into the warehouse to get the wines out, "and we were talking of that when I saw Griffin and "said, 'Here he comes now,' and they left me then, and

" went for the warehouse, while I went down gathering " as many men as I could, and started them at work."

Q. " Did Mr. Griffin open the door right away, as soon " as he got there ? A. No, sir. When I went below the " warehouse I met Stevenson and he said, ' The d——d " tool—or something like that—wouldn't open the ware- " house,' (objected to); and he wanted that I should see " Griffin, and when I went to the door he had started around " the other way around the house, and I called to him; he " hesitated, and then said: ' You have as much right to " open the door as I have,' or something like that, and I " told him that he had the key, and he had better unlock " the door. * * * * " I can't tell now who did open the door. * * I don't " believe I know. It strikes me that it was broken in."

The same witness, on cross-examination by counsel for the Government, said, when asked if the store-keeper offered any resistance to the removal of the spirits : " He " did not open the door. All he said to me, to amount to " anything, was, ' I have no right to open the door that I " know of. You have as much right to open the door as " I have.' ' Well,' said I, ' the house is going to burn, and " I want to save as much as I can.' ' Well,' he said, ' it " was in the Government's hands.' "

This witness is sure that a " great quantity" of the spirits could have been taken out if the storekeeper had been on the ground, and had opened the door—perhaps a thousand barrels—and that they could have been put in a place of safety.

The witness Rehder lived near the premises and was early at the fire. He saw the danger, and commenced at once to get the books out of the store. He also details the efforts made to arrest the fire, and continues: " We left the " office, and I ran right down to the warehouse, taking " some men with me, and I said, ' The best thing we can

" ' do is to get the whiskey out.' We went down there, " and the door was locked, and no one there to unlock it. " There were from fifty to one hundred men with me ; " they all knew me, and knew what I would do. Says I, " ' Where is the store-keeper ?' I then went around the " building, and went up again to the office, and could find " nothing of the store-keeper. I inquired of a great num- " ber of persons if they had seen the store-keeper.

Q. " Who was the store-keeper? A. I could not tell " you who he was; I did not inquire. At last the gentle- " man came around. We had a big stick of timber, and " were agoing to batter the door in. ' What do you want " ' to do ?' he says. We answered, ' We want to batter " ' the door in.' He said, ' I have a key, but I have no " ' orders to open the door.' "

This witness testifies that the spirits could all have been gotten out and saved if the store-keeper had been there and had opened the door promptly. As it was, from 150 to 200 barrels were rolled out, but they took fire because of the flow of burning spirits from the warehouse, and all but five of them burned. He does not know how the door was finally opened, for, after his interview with the store-keeper, he left to find Mr. Farrell, or somebody, to allow him to beat the door in, and when he returned it was open.

The testimony above stated appears in the Record, pp. 20 to 34, Abst., pp. 13 to 17. The court found as matter of fact that the distilled spirits mentioned in the bond sued on, were on the 27th of July 1870, entirely destroyed by fire without any fault, negligence or carelessness on the part of DeWitt C. Farrell, or any person in his employ, while in the bonded warehouse connected with his distillery and that said warehouse was in charge of an internal revenue store-keeper: and ruled as a matter of law that the plaintiffs in error were liable for the tax.

Assignment of Errors.

1. The Circuit Court erred in holding that the plaintiffs in error were liable for the tax mentioned in the bond sued on, notwithstanding the finding of the court, as matter of fact that the high-wines or distilled spirits upon which the tax was claimed by the government, were entirely destroyed by fire, without any fault, negligence or carelessness on the part of said DeWitt C. Farrell, or on the part of any person in the employ of said Farrell in charge of the distillery and bonded warehouse in which said high-wines were contained.

2. The Circuit Court erred in its application of the law to the facts in the case, in this, in holding the plaintiffs in error liable in this suit, it clearly appearing that without their fault or negligence, from a period prior to the expiration of one year from the date of the bond sued on, it had not been, and at the time of the commencement of this suit, it was not in the power of the defendants in error, to deliver to the plaintiffs in error the distilled spirits described in such bond.

3. The Circuit Court erred in refusing to render judgment for the plaintiffs in error upon the finding of the facts as aforesaid.

4. The Circuit Court erred in finding the issues for the defendants in error.

5. The Circuit Court erred in overruling the motion of plaintiffs in error for a new trial.

6. The Circuit Court erred in rendering judgment against the plaintiffs in error.

Wherefore the said plaintiffs in error pray that the judgment in the Circuit Court against them may be reversed.

E. B. McCaleb

Counsel for Plaintiffs in Error.

ARGUMENT.

The first clause of the first section of the Act of 1868, is the only part of the law which imposes a tax. It is as follows: *Be it enacted, &c.*: That there shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid, a tax of fifty cents on each and every proof gallon *to be paid by the distiller, owner or person having possession thereof, before removal from distillery warehouse.*

The 15th, 24th and 25th sections determine the mode of paying it, and when and how it shall be paid; and there does not seem to be any other way, or time of paying it, than thus provided.

The 15th section is in effect:

That the distiller shall provide, at his own expense, a warehouse, to be a part of his distillery premises, to be used only for the storage of distilled spirits of his own manufacture — which is declared "to be a *bonded warehouse* "*of the United States*, to be known as a distillery warehouse, "and shall be under the direction and control of the col- "lector of the district, and in charge of an internal revenue "store-keeper, assigned thereto by the Commissioner of "Internal Revenue; and *the tax on the spirits stored in* "*such warehouse shall be paid before removal from such* "*warehouse.*"

U. S. Stat. at Large, Vol. 15, p. 130.

And Sec. 16 provides that all distilled spirits (and to this there is no qualification, every gallon of spirits distilled under the act is within this provision) must go to the bonded warehouse.

The 23d section, page 135, determines the character and marks of the casks into which distilled spirits shall be drawn,

directing that the gauger shall, in presence of the keeper of the warehouse, place upon the head of each cask, an engraved stamp, signed by the collector and the storekeeper, and himself, and shall have written thereon, the number of proof gallons contained therein, the name of the distiller, the date of the receipt into the warehouse, and the serial number of each cask; and that the distiller, or owner, after the removal of the casks into the warehouse, and on the 1st, 11th, or 21st of each month, or within five days thereafter, shall enter the same for deposit in such warehouse, (which entry shall specify the amount of tax, &c., and be verified by oath), and shall give bond in double the amount of tax on the spirits as specified in the entry, conditioned that he will pay the tax, or cause the same to be paid before the removal of the spirits from said distillery warehouse, and within one year from the date of the bond.

There is no provision up to this time by which the tax can be paid. Now, for the first time, has the amount been ascertained; and there is no provision in the law by which there is, or should be, incorporated into the bond a recital or statement that the tax is due. Every provision fairly construed negatives it.

Section 24, page 136, provides that the spirits may be withdrawn, on payment of the tax, as follows: "That any "distilled spirits may, on payment of the tax thereon, be "withdrawn from warehouse on application to the collect- "or of the district in charge of such warehouse, on mak- "ing a withdrawal entry in duplicate."

(Here the form of such withdrawal entry is given.)

"And the entry shall specify the whole number of casks, "with the marks and serial numbers thereon, the number "of guage or wine gallons, and of proof gallons, and the "amouut of the tax on the distilled spirits contained in

"them; all of which shall be verified by the oath or affir-
"mation of the person making such entry; *and on pay-*
"*ment of the tax, the collector shall issue his order to the*
"*store-keeper in charge of the warehouse for the delivery.*"

Sec. 25, same page, provides how they shall be withdrawn; in other words, how the tax is to be paid. That is by affixing on each cask a stamp issued by the collector, which must, among other things, state the serial number of the cask; and Sec. 52, page 146, provides that no article shall be withdrawn or delivered from the distillery warehouse, except on the order or permit of the collector, addressed to the storekeeper; it can be paid in no other way, and at no other time or place than is provided in these sections, and the provision they make for payment is for a payment after the deposit of the distilled spirits in the warehouse.

These several clauses of the act, I submit, fix the time of payment of the tax as and when the spirits are withdrawn.

The portions of the law which may seem to militate against this, are the last clause of the first section, which is as follows: "Every proprietor or possessor of a still, dis-
"tillery, or," &c., "shall be jointly and severally liable for
"the taxes imposed by law on the distilled spirits pro-
"duced therefrom, and the tax shall be a first lien on the
"spirits distilled * * * from the time said spir-
"its are distilled until the said tax shall be paid." And a part of the 4th section, cited below—and it is this last section which it is argued makes the tax due—and under which Judge TRIGG, of the Middle District of Tennessee, (*Mason* v. *Peabody*, 13 Int. Rev. Rec., p. 142,) is reported to have held that it was due at the moment of production.

Now, the 4th section of the Act cited as the basis of this decision, after defining the meaning of the words distilled

spirits, used in the first section, declaring that within the true intent and meaning of the Act, distilled spirits "is that "substance, known under various names, which is com- "monly produced by the fermentation of grain, starch, mo- "lasses or sugar, including all dilutions and mixtures of "such substances," provides that "the tax shall attach to "this substance as soon as it is in existence as such." If the fourth section makes the tax due, it is by virtue of the words included in quotation marks; there is no affirmative declaration in the Act to that effect, unless the provision that the tax shall "attach" is so construed; and there is a twice repeated declaration in it, to the effect that the tax is not due until the spirits are removed.

There is no word in the Act as to when the tax shall become due, except as above stated, and there is no possibility of its payment when, as provided by the law, it attaches, nor till some time after.

In direct sequence to this is the first section, which enacts that there shall be levied and collected on all distilled spirits, a tax of fifty cents on each and every proof gallon, to be paid before removal from the warehouse; whoever may be liable for it, or to whatever it may be attached, the time for its payment is extended to the time of its removal, unless it shall be left in the warehouse for a year, as provided by law and in the condition of the bond, and in such case the spirits themselves are forfeited. (Sec. 56, p. 149.)

And the Act itself provides the condition of the bond to be given, and in pursuance of which the bond in this suit was given. The language is: "That the distiller or "owner shall give his bond in duplicate," (the Court will notice that it does not need to be the bond of the distiller; it may be the bond of the person who has at the moment bought the property; it is to be the bond of the owner,) "with one or more sureties satisfactory to the col-

'lector of the district, *conditioned* that the principal named "in the bond will pay the tax on the spirits, as specified in "the entry, or cause the same to be paid before removal "from said distillery warehouse, and within one year from "the date of said bond." Here is not one word about the tax being due, as there is not a word of its being due at this time in any other part of the law.

Checks and guards were found necessary to prevent unlawful distillation, and the surreptitious removal of the property before the tax was paid, and so it was made a lien not only on the distilled spirits, but also on the distillery and real estate, and it was attached to certain substances from which spirits are made as soon as in existence, in order that they should not be withdrawn from the distillery where they were under the guard of a government officer, upon the pretense that they were not yet distilled spirits in the eye of the law, and thus the tax be evaded. These provisions all alike look to the security of the tax, and have no reference to its time or mode of payment.

Judge TRIGG says it is due by force of the 4th section. If so, then it is because of the word "attach." To read this clause in connection with the other sections of the Act is to deny this word any such force or meaning, and certainly it has no such meaning in the ordinary acceptation of it, nor is there any such definition of it as would by its use make the tax due. By it the tax is joined to the spirits; it follows them; they cannot be separated from it. This is all that it means. The definition of the word is to fasten, to tie, to join, to bring into contact, to unite closely, to connect; and its proper synonym is to affix; the latter being used in a merely external or physical sense, as to affix a placard to a wall; the former, to "attach," being more metaphorical, and used because of a feeling that one thing ought to go with the other by way of necessary use.

estopped. A recital is only an estoppel where it is of the essence of the contract.

McCrea v. *Purmort*, 16 Wend., 460.

If the tax was due and owing, then an action could have been maintained against the distiller for it when the bond was given; and where is the provision of the law that would permit this? And certainly upon the bond itself there was no right of action until there was some breach of the condition. It is an executory contract; a thing in action. Its form is substantially prescribed by statute, and it must not be extended beyond its obvious meaning. There is no vested right in the obligee, not even the right of action, until there is some breach of the condition.

Badlam v. *Tucker*, 18 Mass., 284.

It may become a debt against the bondsmen if the tax is not paid before removal, or in one year; but it is not a present debt; it is a mere security that the obligors will do something, to wit, pay the tax on removal, or within a year; and this could only be done in one way—by purchasing stamps, each one of which must have on it a serial number corresponding to a serial number on one of the barrels in the warehouse.

Under the Act the warehouse was the warehouse of the Government, and the store-keeper the agent of the United States, assigned to his place by the Commissioner of Internal Revenue.

U. S. Stat. at Large, Vol. 15, p. 131, last part of Sec. 15.

U. S. v. *Singer*, 15 Wall., 111.

From the time the spirits went into the barrels, they were solely and exclusively in the possession of the Government; any attempt to remove them, except in the way provided for by the law, causing their forfeiture. (Sec. 36, p. 140.)

The Government chose to keep the property in its own custody till it should receive a specified sum; and whatever was the nature of this bailment, it was bound upon every principle of law, if not to protect it, at least not to prevent its protection by the owner in an emergency. And this right to receive and have the property was the consideration, and the only consideration of the defendants' promise to pay. The principal defendant has paid all prior taxes and charges, and the defendants are now ready to do what is required of them if the Government is ready to perform, and it refuses; they tender performance on their part if the plaintiff will perform on its part, and it cannot. The consideration for which the promise was made is gone. When they pay, they are entitled to stamps having on them the same serial numbers as the numbers on the barrels containing the gallons of spirits, to recover the tax on which this suit is brought. They cannot be furnished; they would be valueless if they could be, and this through the act of the obligee. The mere right to manufacture was not the consideration; this had been given and paid for before. The right to sell was all that gave any value to the spirits at the time this bond was given.

U. S. v. *Linn*, 15 Peters, 314.

Again: the United States, being a body politic, is competent to enter into a contract.

Brightly's U. S. Digest, vol. 1, p. 841.

It is bound to use diligence, as the holder of a bill of exchange, to charge the endorser.

United States v. *Bank of Metropolis*, 15 Peters, 377.

United States v. *Barker*, 12 Wheat., 559.

As the drawee of a bill, it is liable to pay damages.

Bank of U. S. v. *United States*, 2 How., 711.

Devereaux—Court of Claims, 27.

It may make a charter party, the same as a natural person.

Swan v. *United States*, Devereaux — Court of Claims, 35.

It may be made liable on a *quantum meruit*.

Richardson v. *United States*, 2 Nott & Hun., (Court of Claims), 483.

As owner of property, it has the same rights and remedies, and is subject to the same liabilities, as natural persons.

In re 858 *Bales of Cotton*. Blatchford's Prize Cases, 325.
U. S. v. *Tingey*, 5th Peters, 115.
" " *Bradley*, 10 " 343.
" " *Hodge*, 6 Howard, 279.
Dugan v. *U. S.*, 3 Wheat., 172.
Neilson v. *Lagow*, 12 Howard, 98.
Dixon v. *U. S.*, 1 Brock., 177.

And a defendant can set up, in a suit brought by it, damages by way of offset, if the claim for damages be sustainable.

Bank of U. S. v. *United States*, 2 Howard, 735.

Upon principle, it cannot be contended that a contract of the United States is different from that of an individual. It would be intolerable indeed, if, while insisting upon its pound of flesh, and knowing no compulsion to be merciful, it is, itself, bound by no law. Sheltered behind its sovereignty, no suit can be brought against it, but by its permission; but when it, of its own motion, enters the courts, it is, with some exceptions not of importance here, bound by the same rules of law that govern the rights and enter into the duties of a citizen.

Upon the payment of the tax, and, simultaneously with

such payment, the owner of the spirits became entitled to an order of removal; to the possession. The words of the Act are:

"And on payment of the tax, the collector shall issue "his order to the store-keeper in charge of the warehouse, "for the delivery."

Vol. 15, U. S. Stat. at Large, p. 136, Sec. 24.

This is the agreement of the Government; plainly the Act contemplated the delivery of the spirits to the owner on payment of the tax. "Where words of recital or "reference manifest a clear intention that the parties should "do certain acts, the Court will, from these, infer an "agreement by them to do such acts."

Chitty on Contracts, Vol. 1, p. 88, 11 American Ed.

Said Lord KENYON, in *Glazebrook* v. *Woodrow*, 8 T. R. (D. & E.), 370:

"The general rule which governs * * * is, that "every man's agreement is to be performed according to "his intent, as far as that is to be collected from the par- "ticular instrument."

And POLLOCK, C. B., in *Knight* v. *Water Works*, 2d Hurlstone & Nor., p. 10: "It is admitted that there is no "covenant in express terms contained in the deed; but "wherever it is manifest from expressions in a deed that "the parties must have intended to stipulate that a par- "ticular thing should be done by either of them, there is "an implied covenant to do it." * * * "Every case "where a covenant is implied must stand upon its own "foundation. * * * The question always is, what is "the reasonable conclusion to be drawn from all the "matters to which the court are entitled to look."

And an action can be maintained by the obligor in a

bond to convey, against the obligee, for the stipulated payments, though there is no covenant to pay. It is implied.

Mason v. *Caldwell*, 5th Gilman, 196.

Vilas v. *Dickinson*, 13 Wis., 488.

There was a contract between the Government and the owner; and the agreement on the part of the Government was, that it would have the property ready for delivery. This was implied by law.

Lyons v. *Mells*, 5 East., 436.

The law will raise a contract by implication between the Government and an individual as against the Government.

Swain v. *U. S.*, Dev. C. C., 61.

The obligations and duties are reciprocal; and the Government is as much bound to deliver as the owner to pay the tax. The bond has, in the subject matter of it, a direct reference to the law; and the obligation must be intended to require of the Government that it shall be in a condition to perform its part of it—*i. e.*, to have the property on hand—to be ready to deliver the distilled spirits. The Court will look at the law under which the bond was given, and will effectuate its intention, whatever be the language used.

Judge of Probate v. *Ordway*, 3d Foster (N. H.), 206.

The covenant (implied) of the Government went to the whole consideration of that which was to be done by the defendants; and if so, it must be in a condition to perform before it is entitled to maintain its action.

The Duke of St. Albans v. *Shore*, 1 Henry Blackstone's R., 270.

"Where non-performance by plaintiff deprives the de-
"fendant not of part, but of the entire consideration of the
"contract, the agreement of defendant shall be deemed
"dependent." Argument of counsel in

Slater v. *Emerson*, 19 Howard, 227, citing,

Pordage v. *Cole*, 1 Wm. Saunders, 320.
Dakin v. *Williams*, 11 Wend., 69.
Atkinson v. *Smith*, 14 M. & W., 695.

Whether the promise in this bond was in consideration of a promise, express or implied, on the part of the Goverment, must be gathered from, and depends entirely upon, the words and nature of the whole instrument. Admitting this to be a sound rule of construction, there can be no doubt of the real consideration of the defendants' promise.

Willington v. *West Boylston*, 21 Mass., 101.

It may safely be asserted, that whenever compensation, or an equivalent is claimed by a party in return for the performance of conditions for which such compensation or equivalent has been stipulated, the person so claiming is bound to show a fulfillment, in good faith, of those conditions; and the party against whom the claim shall be made, shall be permitted to repel it by proof of an entire failure to perform, or of an imperfect or unfaithful performance; or by proof of injurious consequences resulting from either of these delinquencies.

The equivalent for the bond was not only a right to manufacture, but to sell. The former right is of no value, without the latter; and if the performance of the Government has been so unfaithful that sale cannot be made, the claim for compensation for the rights thus given can be repelled.

The case at bar, then, is this, that the plaintiff, having possession of the principal defendant's property, which it had agreed to deliver to him on payment of a stipulated sum of money, and the consideration of such payment, or agreement to pay, being the plaintiff's agreement to deliver, having put it out of its power to make such delivery, sues for the money. Can it enforce the contract as against the defendants, when, through its own wrong, it cannot perform?

It undertook to keep the spirits, and impliedly that they would be ready for removal, and that the owner might remove them when he paid the tax.

The statement of the claim should refute it; and to suffer the plaintiff to prevail, is to commit the most flagrant wrong.

As held by this Court upon an analogous state of facts, in *Clinkenbeard et al.* v. *U. S.*, 21 Wal., 65, it would be unjust and oppressive. That was an action by the Government on a distiller's bond, given under the law of 1868—the law now in question. Among other provisions, the law and the bond required that the distiller should pay a capacity tax—in other words, that he should pay a tax on 80 per cent. of the producing capacity of his distillery, whether he actually produced that amount or not.

This was imperative; only by so agreeing could he get permission to operate a distillery. The one exception under the law being, that if he should desire to suspend work, by taking certain steps, he might do so.

For four days, through the neglect of the Government, no store-keeper was appointed, and he dare not operate his distillery, lest it should be seized; the Government sued him for the eighty per cent. for these days.

According to the condition of his bond he was liable. He had agreed to pay eighty per cent. of the producing capacity of his distillery, and had not done so. The law had not provided that he should be relieved if the Government failed to perform. It might be argued, there as here, that he took the chances. The law under which the bond was given (22d Sec.), provided that from an hour after giving such bond, "every distiller shall be deemed to "be continuously engaged in the production of distilled "spirits in his distillery, except in the intervals when "he shall have suspended work, as hereinafter authorized "or provided."

All this was held by the Court in *U. S.* v. *Singer*, 15 Wall., 120, to be free from the charge of unnecessary harshness, because of the intent of the law which was to prevent the secret production of spirits, and consequent evasion of the Government tax; and that the distiller was advised before entering into the business of distilling, that if he did so he must know the producing capacity of his distillery.

But nevertheless, the Court in the case now under discussion, regarded the spirit of the bond there sued on, and held the omission of the Government to appoint a storekeeper to be a defense, saying, that to charge the defendants in that case with the capacity tax during the days in question would be unjust and oppressive. There was no affirmative agreement in that case, on the part of the Government, that it would appoint a storekeeper, but it was its duty under the law, and failure to perform such duty was held to excuse the obligor. And here lies the distinction between the case at bar, and all that class of cases which may be cited to the effect that the Government does not become bound to others for the consequences of its neglect, unless by express agreement to that effect; or, in other words, that it does not become an insurer or a guarantor, so that it can be charged with a loss. The plaintiffs in error are not seeking to hold the Government as an insurer, or claiming any liability on its part for the loss. They only ask that it shall do justice—abide by the terms of the contract it made—and give them the property when it takes the tax. They do not claim damages; they simply say they are excused from performance, on their part: that though the condition of the bond has not been performed by them, yet it is not the fact that an action can therefore be maintained.

Badlam v. *Tucker*, 1 Pick., 286.

It may be admitted by the plaintiffs in error, to the full-

est extent that shall be contended, that in executing the bond in question, they did know and consent to be dealt with upon the understanding that the Government could not be made responsible for the act of its officers. They are not seeking to enforce a liability against it for any such misconduct, or asking that it make good their loss, but only claiming that it cannot enforce a contract rendered valueless to them by its act, and which it cannot perform on its part. It may be that it was no part of its contract with them that the Government should appoint an honest or a capable officer, but it did agree, they contend, to give them the spirits, when they should pay the tax, if it was paid within nine months, after which, if the tax remained unpaid, the property, itself, became forfeited to it. In the case in 12th Wheat., *U. S.* v. *Nicholl*, p. 510, which was based on *U.S.* v. *Kirkpatriek*, 9 Wheat., 720, and *U. S.* v. *Van Zandt*, 11 *Ib.*, 184, this Court queried whether a surety would not be discharged by so giving time to the principal debtor as to suspend its right to sue, and in *U. S.* v. *Barker*, 12 Wheat., 559, this Court held that an endorser was discharged by the neglect of the Government to send notice of protest within the time limited by law. There is an obvious distinction between holding the Government liable to make good a loss occasioned by the misconduct of its officers, and refusing to permit it to disregard its own omission of duty, resulting in a failure or inability on its part to perform its contract, and to enforce such contract against the other party to it.

As against the positions assumed in this brief, the cases of

Thayer v. *U. S.*, 4 N. & H., 95;
Dair v. *U. S.*, *Ibid.*, 172;
Gregg v. *U. S.*, *Ibid.*, 103;

will perhaps be cited by the Government, and some consideration of them here may therefore be excused. They were alike cases of leakage, were decided

under the law of 1864, and were severally actions by distillers against the United States, to recover taxes that had been paid. The law made provision for an allowance for leakage under certain circumstances, but none where the spirits were in a bonded warehouse. The cases of *Thayer* v. *U. S.* and *Dair* v. *U. S.* were for loss by leakage while the spirits were in the bonded warehouse; the case of *Gregg* v. *U. S.* was for leakage while the spirits were removed under bond, to different points for exportation, the claimants having changed their minds after they reached such points, and exposed them for sale in the home market. In all the cases the spirits had previously been inspected at the distillery; the quantity and proof determined, and marked upon the casks with permanent marks, and the duty thus ascertained; and in each case the spirits having been sold at home, all three were determined upon the same principles. The only question was, when did the duty attach? But there was no pretense that it then became due; on the contrary, the law made provision for the withdrawal of the spirits from the warehouse for exportation without payment of the tax, and the court said:

"When the spirits were removed to the bonded ware-
" house, the quantity found by the inspection was the ex-
" isting property of the claimants, to which the duty had
" attached, subject to be defeated by the exportation of
" the spirits, and by that only. And when the claimants
" removed the spirits from the bonded warehouse for con-
" sumption or sale, they fixed the fact that they were not
" to be exported; and then the duty became immediately
" payable, as in all other cases of spirits removed for con-
" sumption or sale."

These cases, then, only decide that the spirits were the property of the distiller; that the amount of the duty was ascertained at the time the spirits were inspected

(the only means provided by statute for assessing it being the inspection at the distillery, the quantity and proof being then found and marked,) and that it became payable when the spirits were removed for home consumption, and not till then; and all this was put on the express ground, that by Sec. 60, of the act of 1864, the bonded warehouse was the store of the owner of the spirits, who held them there at his own option, and for his own purposes and profit, and had access to them at all reasonable times and for all proper purposes; the sufficiency and preservation of his casks being matters for his responsibility, and the joint custody of the Government, with him, of his warehouse and spirits being only that supervision necessary to prevent fraud on the revenue. See *Thayer* v. *U. S.*, page 98.

But all this the Government changed. By the Act of 1868 it took the spirits into its own custody; it excluded the owner wholly and entirely from the warehouse; and it provided that such warehouse should be a bonded warehouse of the United States. That it thereby made it its warehouse, and the persons in charge its officers or agents, was decided by this court in the case of *Singer* v. *U. S.* 15 Wal., 111. It was doubtless found that it did not do to leave the spirits in the joint custody of the officer of the Government, and the distiller, and hence the change. As construed by this case, the Act of 1868 does not contemplate that the bonded warehouse is the store of the owner of the spirits, nor that the property is in the joint custody of the Government and himself, nor was such the fact.

The decision of Judge McCandless, reported in 10 I. R. R., p. 86, *U. S.* v. *Barrows*, was made in a suit brought by the United States upon an oil transportation bond, the defense being that the tax should be reduced, because of a loss by leakage from the casks, occasioned

by their exposure to a hot sun while in transit from a district in Pennsylvania to another in New York, such leakage being in excess of the quantity allowed for leakage by the regulations of the Department at Washington, and having occurred while the property was in possession of the owners. Judge McCandless held that the removal was made under a direct provision of law, requiring that in case of such removal the oil, on its reaching the point of destination, must be transferred to a bonded warehouse, and there again inspected and gauged; and that the duty be assessed and paid on any *deficiency* or *reduction* of the *number* of gallons (beyond such allowance for leakage as might be established by the regulations of the Commissioner of Internal Revenue), received at the bonded warehouse from the number of gallons, as stated in the bond, at the place of shipment; that such law established a plain rule of computation, and the per centum being fixed by the Department, in conformity with its requirements, became part of the law, and of as binding force as if incorporated in the body of the act itself.

The reason of this rule is manifest. It was made to prevent any temptation to abstract oil from the casks while *in transitu*. Congress, to facilitate exportation, exempted oil withdrawn for that purpose, but wisely provided that beyond a reasonable allowance for leakage, the owner must take care, at his peril, to have as much oil on hand at the place of exportation as he had taken from the original place of shipment; and only by agreeing to this could he export at all. It was of the same nature as the capacity tax, one of the many safeguards against dishonesty, the necessity for which experience had proved.

In the light of the facts, the reasoning of the learned Judge has no application whatever to the case at bar. The owner of the oil, under a provision of the law regulating the allowance for leakage, if he should take the property

into his possession, and subject to it, had given bond and taken such possession; he had thus agreed to pay the tax on whatever deficiency there might be over a certain amount. As the court said, the Government is not an insurer, and the only way in which the owner could comply with the condition of his bond was to show to the collector of the district where he gave it that he had placed the oil in the designated warehouse for exportation, or by payment of the tax. One or the other he had agreed to do, the consideration to him being the sole and unsupervised control of his property as against a prior supervision of the Government.

The argument, that according to these holdings the only defense possible in this suit is, that defendants have complied with the condition of the bond sued on, is simply a *non sequitur*. They have no bearing on the defense here interposed. The property in question in this suit perished in the custody of the Government; and as Judge McCandless construed the intention both of the obligors in executing, and of the obligees in taking the bond in suit before him, under the law then in force, so here, in construing the bond in suit, regard must be had to the intention of the plaintiffs in error when they made it, and to the nature of the duties of the defendants in error under it. When this court considers that the bond required by the section of the Act of 1868, under which the bond in suit was made, might as well be given by the owner at the time being of the property bonded, although such owner was a person who had nothing to do with the manufacture, and no interest in it up to the moment of its being gauged, and the number of proof gallons ascertained, the conclusion seems apparent that the consideration for the promise contained in the bond on the part of the obligors, is the right to withdraw and sell, and the implied promise on the part of the Government (the

obligee), it having kept the property in its possession, that it will have it on hand for delivery when it shall demand the tax, unless it has in the meantime been forfeited.

The plaintiffs in error would be excused from performance, if the act of the obligee prevented them from performing.

To this effect there is plenty of authority:

Badlam v. *Tucker*, *supra*.
U. S. v. *Dixey*, 3 Wash. C. C., 15.
U. S. v. *Mitchel*, *Ibid*, 95.
Mounsey v. *Drake*, 10 John., 27.
Baylies v. *Fettyplace*, 7 Mass., 325.
Irion v. *Hume*, 50 Miss., 419.

And this is so, though there be no agreement expressed, that the obligee will not prevent them. It is implied, and what is the difference, whether the Government by its act prevents the obligor from performing, or prevents the performance on its part of its implied promise, which was the consideration of the obligor's promise?

There is still another view to be taken of this case, which we submit is fatal to the plaintiff, even though the Government is not chargeable with any default, or negligence in not saving the property, and incurred no liability as bailee. There was an implied contract on its part, and the defendants may fairly say to it, in the language of CLEASBY, B., in *Jackson* v. *Union Marine Ins. Co.*, 10 Law R. Com. Pleas Cases, 133: "You have broken the "contract; and I have lost all the intended benefits by "your breach, and I am thus discharged."

In the case last cited, a ship had been chartered to go from Liverpool to Newport, and there load a cargo of iron for San Francisco. She sailed, got aground, and because of the delay, the charterer hired another ship. The action was on a policy of insurance on the freight money.

The court held that it was an implied term of the contract, that the vessel should arrive at Newport within a reasonable time ; that if she was prevented by an excepted peril, the charterer would have no cause of action, but would be released from performance on his part.

In this view, the plaintiffs in error do not need to ask any questions as to what might be the liability of the Government, if a suit could be brought against it on its contract to deliver; they simply say, by the breach on its part, even if such breach was occasioned by a default which in no way rendered it liable—and would have created no liability against an individual, if under like circumstances he had been guilty of a like breach—they have lost all the intended benefit to them of the contract sought to be enforced and are thus discharged.

To the same effect is *Poussard* v. *Spiers*, 17 English Rep. (Moak), p. 97. Madame Poussard engaged to sing for the defendant at his theatre in London, for three months, but was taken sick before the time she was to commence, and it became necessary to supply her place. As soon as she recovered, she tendered her services, in performance of her contract, and they being refused, an action was brought. The court held that, her inability having been occasioned by sickness, was not a breach of the contract, and no action would lie against her or her husband for the failure thus occasioned; but the damage was the same to the defendant as if it had been caused by her fault, instead of her misfortune; and if it was so great as to go to the root of the matter, the defendant was discharged.

I cite these cases as stating and emphasizing a principle of natural equity, which the courts will enforce, outside of any statutory law respecting a failure of consideration, or the reason or cause of such failure, that in a con-

tract where there are reciprocal obligations, if by the act of one party, though such act is the result of misfortune, and not of fault or neglect, the other has lost all the intended benefit of the contract, he is discharged formance on his part.

Of Counsel for Pla

Chicago, December, 1878.

The court held that it was an implied term of the contract, that the vessel should arrive at Newport within a reasonable time ; that if she was prevented by an excepted peril, the charterer would have no cause of action, but would be released from performance on his part.

In this view, the plaintiffs in error do not need to ask any questions as to what might be the liability of the Government, if a suit could be brought against it on its contract to deliver; they simply say, by the breach on its part, even if such breach was occasioned by a default which in no way rendered it liable—and would have created no liability against an individual, if under like circumstances he had been guilty of a like breach—they have lost all the intended benefit to them of the contract sought to be enforced and are thus discharged.

To the same effect is *Poussard* v. *Spiers*, 17 English Rep. (Moak), p. 97. Madame Poussard engaged to sing for the defendant at his theatre in London, for three months, but was taken sick before the time she was to commence, and it became necessary to supply her place. As soon as she recovered, she tendered her services, in performance of her contract, and they being refused, an action was brought. The court held that, her inability having been occasioned by sickness, was not a breach of the contract, and no action would lie against her or her husband for the failure thus occasioned; but the damage was the same to the defendant as if it had been caused by her fault, instead of her misfortune; and if it was so great as to go to the root of the matter, the defendant was discharged.

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tract where there are reciprocal obligations, if by the act of one party, though such act is the result of misfortune, and not of fault or neglect, the other has lost all the intended benefit of the contract, he is discharged from performance on his part.

E. B. Mc Cagg

Of Counsel for Plaintiff in Error.

Chicago, December, 1878.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

DE WITT C. FARRELL ET ALS.
v.
THE UNITED STATES.
No. 816.

ERROR TO UNITED STATES CIRCUIT COURT FOR NORTHERN DISTRICT OF ILLINOIS.

APPELLEES' BRIEF.

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APPELLEES' BRIEF.

STATEMENT.

Suit on a distiller's warehousing bond, dated June 13, 1870, conditioned for the payment of the taxes on 499 barrels of distilled spirits, "containing 32,182.89 proof-gallons, which were entered for deposit in the distillery warehouse No. 6 of D. C. Farrell, at Peoria, in the fifth collection district of Illinois, on the 10th day of June, A. D. 1870, *before such spirits shall be removed from such warehouse, and within one year from the date hereof.*" (Record, 8.)

This bond was taken under the act of July 20, 1868, c. 186, § 23 (15 Stats., 135, 136). (Record, 8.) The suit

was to recover $16,116.50, taxes claimed to be due on these spirits. (*Ib.*) The defense is that the liquors and the warehouse in which they were stored were destroyed by fire July 27, 1870, without any fault or negligence on the part of either of the defendants. (Record, 9.)

Testimony was adduced to prove that the keeper, with the key of the storehouse, was away at dinner when, and for about half an hour after, the fire commenced, so no one had access (by key) to these barrels of liquor to remove them. Had they been accessible, some of the witnesses thought many of the barrels might have been taken out; but it was shown that liquors which were removed were rolled down to the river bank and there, nevertheless, burned, the fire running along the whisky from the warehouse to the river. (Record, 9 to 18.)

Five barrels only out of the 499 were saved. (*Id.*, 15, line 11.)

The court ruled that, as matter of law, the defendants were, upon these facts, liable for the tax upon these liquors, and ordered judgment therefor, to which the defendants excepted. (Record, 18.)

BRIEF.

Two questions arise upon these facts:

1st. Was the destruction by fire of this property, without fault or negligence upon the part of these defendants, any sufficient excuse for the non-performance of their agreement that the taxes thereon should be paid within one year from June 13, 1870?

2d. If the fire alone was no excuse, does the fact that the storekeeper was away at dinner during the fire make out any defense?

I.

This action is upon a contract under seal, whereby, for a good, lawful, and valuable consideration, to wit, being permitted to carry on the business of a distiller and to delay for nearly a year after manufacture, to suit the convenience of the maker, payment of the tax thereon, the obligees bound themselves that the tax should be paid whenever the liquors were removed, and in one year from its date at all events.

The building in which these liquors were stored was the property of Mr. Farrell, and not of the government. The act of July 20, 1868, c. 186, § 15, requires "that every distiller shall provide, at his own expense, a warehouse, *to be situated on and to constitute a part of his distillery premises*, to be used only for the storage of distilled spirits of *his own* manufacture; but no dwelling-house shall be used for such purpose, and no door, window, or other opening shall be made or permitted in the walls of such warehouse leading into the distillery, or into any other room or building; and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be a bonded warehouse of the United States, to be known as a distillery warehouse, and shall be under the direction and control of the collector of the district, and in charge of an internal-revenue storekeeper assigned thereto by the Commissioner of Internal Revenue; and *the tax on the spirits stored in such warehouse shall be paid before removal* from such warehouse." (15 Stats., 130,131.)

The next section (16) requires the construction in a specified manner of two or more receiving-cisterns, of capacity sufficient at least for a day's distillation, "into

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The next section (16) requires the construction in a specified manner of two or more receiving-cisterns, of capacity sufficient at least for a day's distillation, "into

which shall be conveyed all the spirits produced in said distillery"; * * * "and on the third day after the spirits are conveyed into such cisterns the same shall be drawn off into casks, under the supervision of such gauger, in the presence of the storekeeper, *and be removed directly to the distillery warehouse.*" (*Ib.*, 131, § 16.)

The twenty-third section of this act also provides "that all distilled spirits shall be drawn from the receiving-cisterns into casks," of a stated capacity, gauged as prescribed, "*and shall be immediately removed into the distillery warehouse.*" (*Ib.*, 135, § 25.)

It is further provided, in the same section, that each cask shall bear a serial number, "in progressive order as the same shall be received from the distillery; * * * and the distiller or owner of all spirits so removed to the distillery warehouse shall, on the first, eleventh, and twenty-first days of each month, or within five days thereafter, enter the same for deposit in such warehouse," under prescribed rules and regulations, the triplicate entry to contain, among other things, the date of the deposit of the casks in the warehouse," and the amount of the tax on the spirits contained in them; *and the said distiller or owner shall give his bond in duplicate, with one or more sureties satisfactory to the collector of the district, conditioned that the principal named in said bond will pay the tax on the spirits, as specified in the entry, or cause the same to be paid, before removal from said distillery warehouse and within one year from the date of said bond,*" &c. (16 Stats., 135, 136, § 23.)

Such was the bond given in the present case.

The next section (24) commences thus: "Any distilled spirits may, on payment of the tax thereon, be withdrawn from warehouse, on application to the collector of

the district in charge of such warehouse, on making a withdrawal entry in duplicate and in form as follows: * * * 'and on payment of the tax the collector *shall* issue his order to the storekeeper in charge of the warehouse for the delivery.'" (16 Stats., 136, § 24.)

Before removal a tax-paid stamp is placed upon each cask. (*Ib.*, § 25.)

Reference to the Record (page 8, bottom, and 9, top) indicates that this liquor was entered for deposit during the first ten days of June, 1870, and that the fire occurred on the 27th of the following month. Here were from 47 to 53 days before the fire in which Mr. Farrell could lawfully have removed every drop of this liquor. It was in his storehouse, subject to his control, removable at his pleasure whenever he chose to pay the tax. (United States *v.* 36 Bbls. High Wines, 7 Blatch., 462, 466, top.)

Mr. Puterbaugh's brief has reached me while correcting the proof of my own. At the bottom of page 14, top of page 15, and in subsequent pages, he speaks of the distilled spirits as in the possession of the United States, and even cites United States *v.* Singer in support of this assumption, although this liquor was distilled *after* the act of March 29, 1869, had required the manufacturer to pay the storekeeper—though I do not myself consider this date to be material. He overlooks the language of the extract from the statute italicized in the opening paragraph of his argument (page 7), which declares that the tax is "to be paid by the distiller, owner, *or person having possession thereof, before removal* from the distillery warehouse." This "person" can hardly be the government, or its storekeeper.

Not only could the distiller withdraw the liquors by giving bond, but if he chose to pay the tax and withdraw them at once, without giving bond, he could do so. If they remained, it was at his option, for his convenience, and only so long as he wished to defer payment of the tax. The regulations controlling the removal of distilled spirits, as found in Series 6, No. 7, page 39, top, are: "Entries for withdrawal may be made at *any* time after the spirits have been stored in the warehouse and entered upon the bonded account. All the spirits produced in any distillery must be removed to the distillery warehouse, even when they are *immediately* withdrawn therefrom; and the entry for deposit must be made at the regular monthly period, although the spirits covered by it have been withdrawn. *The bond to be given must cover all the spirits remaining in warehouse at the end of the monthly period.* If all the spirits deposited during that period have been withdrawn, no warehousing bond will be required; but the collector will, in such case, certify upon the entry that such spirits have been withdrawn, giving the dates of the withdrawals, and the amount of the tax collected on the tax-paid spirits."

He was no more subject to lose it by fire than if stored elsewhere. It remained in the distillery warehouse by his choice, doubtless because he did not care to pay the tax until he had arranged for a sale of it. It staid where it was for his benefit. The injury to him from the casualty that occurred was no greater than if the spirits had been burned in a commission-house in Chicago, and was no different in kind from that which befalls every citizen whose property is consumed.

It is a mere accident of the case that the United States is his creditor in connection with the manufacture of these spirits.

Each cask was identified as a taxable article by its serial number, &c., as soon as it was put into the distillery warehouse. (16 Stats., 135, bottom.) The right to the tax had accrued to the United States, and its amount was ascertained, and was indicated in the entry for deposit. (*Ib.*) Thereupon, at the same time, and as part of the same transaction, the distiller gives this bond to secure the payment of such tax before the lien upon the liquors is lost by removal, and within the reasonable time of one year at all events. (*Ib.*, and p. 136, top.)

How particular the regulations are to insure the taxation of every gallon may be seen from the condensation of them in Burroughs on Taxation, 628. And the Record shows the quantity computed to the hundredth part of a gallon. (Record, 8.)

While the case is analogous to that of importations subject to customs duty, it is to be noticed that wherever the analogy fails the difference is in favor of the government in this case. Customs duties are imposed only on goods actually imported, whereas the internal-revenue tax may be assessed upon a man for the liquors his distillery was adjudged *capable* of producing, although that quantity was not in fact made. (United States *vs.* Singer, 15 Wall., 120; Pahlman *v.* Collector, 20 Wall., 200; United States *v.* Ferrary, 93 U. S., 628.) In one case reported it is expressly found that the distiller faithfully returned all the spirits actually distilled, and that it exceeded 80 per cent. of the producing capacity of his distillery; yet he was held liable, because it did not amount to three and a quarter gallons for each bushel of grain used. (Collector *v.* Beggs, 17 Wall., 184, 190.)

The purpose of referring to these cases is to show how

rigidly the tax upon the business of distilling spirits is enforced; for it is rather, on the whole, a tax on the business than on the article produced, as it is largely based on capacity, rather than production, so long as the business is carried on.

Customs duties accrue at the moment of importation—that is, upon arrival at the port of entry—and not when the goods are actually entered at the custom-house. (United States *v.* Vowell, 5 Cranch, 372; United States *v.* Lindsay, 1 Gall., 365; Sch. Boston, *Ib.*, 239; United States *v.* Dodge, Deady, 126.)

The statute under which this bond was given fixes the time when the tax accrued upon Mr. Farrell's goods. Section 4 of the act of July 20, 1868 (c. 186), commences with a definition of what constitutes "distilled spirits," adding: "and *the tax shall attach to this substance as soon as it is in existence* as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process." (15 Stats., 126, § 4.)

The first section of this same statute concludes with the provision that "Every proprietor or possessor of a still, distillery," &c., &c., "shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, and on the lot or tract of land whereon the said distillery is situated, together with any building thereon, from the time said spirits are distilled until the said tax shall be paid." (*Id.*, 125, § 1.)

Here we have stated the time when the right to the

tax first exists and the security for its payment; which security is the personal liability of the manufacturer and of every person in any way interested in the distillery, a lien upon the spirits and on all the property, real and personal, used in its manufacture, and the guarantee of the sureties who sign such bonds as are by law required of the distiller.

Except that they are more stringent, these provisions are analogous to those that secure the payment of customs dues. These, too, are a personal debt or charge upon all the importers. (Meredith *v.* United States, 13 Peters, 486.) So in Dumont *v.* United States (No. 50 of the present term), it was observed from the bench that, although the sureties were only liable for the precise amount stipulated in the bond, the importer could be holden for the full duties. The bond taken at the custom-house is but *collateral security* for the payment of these duties, for which debt or assumpsit will lie independently of the bond. (United States *v.* Lyman, 1 Mason, 482; United States *v.* Hathaway, 3 Mason, 324; United States *v.* Howland, 2 Cranch Cir. Ct., 508, bottom.)

These citations answer the proposition which I now find upon the top of page 14 of Mr. Puterbaugh's brief, that if the tax existed assumpsit could be maintained; so it could, without formal assessment, in case of removal; as is shown by cases of U. S. *v.* Ferrary, 92 U. S., 630, 631, and of the Dollar Savings Bank, 19 Wall., 240; but the permission to keep in bond only *delays* payment, and in no event releases it. It is equivalent to accepting a note on one year. The promisor owes the money all the time, though not legally compellable to pay it until the maturity of the note.

William Wirt, who held the position of Attorney-General for twelve years (much longer than any other incumbent of that office), gave this opinion to the Secretary of the Treasury April 15, 1819: "I have received your communication of the 12th instant, requesting my opinion on the question whether the destruction of goods by a public enemy releases the owner from the payments of the duties on those goods which had been secured according to law, and I answer the question in the negative. The importation being complete, and *the duties secured by bond, the subsequent destruction of the goods by the enemy can no more release the obligor from the payment of the duties than the same act would entitle him to have the duties refunded if he had in fact paid them.* On the contrary, he stands on the common footing of the many sufferers by the enemy during the war, who have no relief but such as Congress may choose to grant." (Atty. Gens.' Ops., 269, 270.)

Though an importer may have to pay half storage on goods in his own bonded warehouse (Clark *v.* Peaslee, 1 Cliff., 545), yet, wherever they may be kept in bond, they are "at the charge and *risk* of the owner." (R.S., §§ 2969, 2962, 2963, and 2964; United States *v.* McDonald, 5 Wall., 652.)

The application I wish to make of the foregoing citations and remarks is this: if the tax existed the instant that distillation took place, and was then and thereafter a liability of the distiller, and a lien upon the spirits and all the property, real and personal, used in its manufacture, to which the bond in suit was a collateral security, then that personal liability and that lien were not discharged by the destruction of the liquors, whether by

fire or in the ordinary method. The *tax* and the liability for it survived; consequently the collateral security should not be impaired by this conflagration.

Independently, however, of any question as to whether the tax and lien survived the flames, we have here a plain, unambiguous *contract* between the United States and these parties defendants below. (United States *v.* Dutcher, 2 Bliss, 51, and 8 Int. Rev. Rec., 161.) They expressly agree to pay the tax accruing upon these liquors whenever they are removed from the warehouse, or within one year from date, whichever contingency first happened. There was no exception or reservation for accidents, and the law can therefore imply none. To do so would be to create an agreement for the parties into which they never entered, and for which the statute did not provide. It *did* provide (in the act of July 13, 1866, c. 184, § 40) for loss by leakage, &c., of liquors in the course of transportation from one warehouse to another under orders of the revenue officer, and for their destruction in transitu. (14 Stats., 160, § 40.) *Expressio unius*, &c. This is the material portion of that section: "and the tax shall be paid on the difference between the number of proof-gallons, *as stated in the bond* given at the place of shipment, and the number received at the warehouse, less the allowance for leakage, as established by the regulations of the Commissioner of Internal Revenue; and except for actual destruction by unavoidable accidents, *by the elements*, or by the public enemy, no other allowance for loss shall be made." (14 Stats., 160, § 40.) The section goes on to state, at the top of the next page, that the storekeeper in charge, "with the owner and proprietor of the warehouse, shall have the joint custody of all the distilled

spirits so stored in said warehouse, *which shall be at the risk of the owner of the said spirits.*" (14 Stats., 161, § 40.)

Several observations arise on this provision of law. It relates to a special state of things; to inflammable goods, while carried (in actual practice) in vehicles propelled by steam, on land or water; for a favored purpose, to wit, to be exported out of the country, and supply the place of so much gold in the liquidation of debts due abroad. The spirits are *taken from the distiller's own warehouse* and put into a general warehouse *provided by the government.* In this building it is stored "*at the risk of the owner of the spirits.*" The reason for inserting this clause was that the government being the proprietor and retaining the key of the storehouse, it was thought best expressly to negative the idea of any responsibility on that account; an idea that could not be entertained at all as to liquors remaining in the distillery and warehouse of the owner and maker. Under the act of March 2, 1867, the obligors in the bond were liable to pay 50 per cent. additional to the regular tax if they failed to account for all of the liquors transported (14 Stats., 483, top, § 23); hence they were allowed to prove its destruction by the elements, &c.

But all these provisions were superseded by the short act of January 11, 1868, c. 3, which prohibited the removal of spirits from the distillery for transportation or any other purpose without prepayment of the taxes thereon. (15 Stats., 34, top.) Thus all claim to be relieved of taxes in any case whatever, by reason of the destruction of the article taxed by the action of the elements, was obliterated.

While this act of July 13, 1866, § 40, was in force, the distiller could not prove that less liquor than that stated

in the bond was removed from his distillery for transportation, and that the larger quantity was inserted by mistake (United States *v.* Dutcher, 2 Bissell, 54, 55, and 8 Int. Rev. Rec., 162), or that the actual leakage had exceeded the allowance therefor. (United States *v.* Barrows, 1 Abb. U. S. Ct. Rep., 351, and 10 Int. Rev. Rec., 86.)

The idea of a bailment of these liquors to the United States, upon a reciprocal engagement that they should be safely kept, so as to be forthcoming upon payment of the tax, cannot be sustained. If so, the sureties would be relieved by the abstraction of the liquors in any way without their fault, which has been held not to be the case. (95 U. S., 318.) In that event, all the provisions for a lien upon aught but the liquors themselves would be idle, as they never could be enforced practically. But the whole purpose and language of the statutes refutes this theory, and it will not be here dwelt upon further.

It is no defense for sureties that the collector permitted the removal, without prepayment of taxes, of spirits upon which such taxes were a lien (Hart *v.* United States., 95 U. S., 318); *nor that goods upon which there was a lien for taxes were seized and wholly forfeited to the United States* (United States *v.* Barrowcliff, 7 Blatch., 519). In the latter case the effect upon the ability to pay was the same as if the goods had been burned; and in addition was the fact that the government had the whole benefit and worth of the property, and by its action prevented the taxes being made out of it.

It may (or may not) be a hardship upon these bondsmen to have to pay these taxes, after the destruction of the subject of them. That depends entirely upon the

unknown matter, whether or not they were covered by an insurance to their full market-value, including taxes. If not so insured, they might have been.

If not insured, even then the hardship is only the ordinary one of a man who perceives the full amount of his debts to survive the loss of a considerable portion of the estate upon which he relied to pay them. The tax was the personal liability of Mr. Farrell. He relied upon these spirits as a means of payment. They are gone; the debt remains. Is there anything unusual in his condition, however melancholy it may be?

At any rate, *is he any worse off than a distiller who has his liquors destroyed after he has paid the tax upon them?* or who fails to receive his pay for them from his vendee?

Again, this liability of Mr. Farrell and his sureties is no greater than that imposed by the statutes of every State, so far as I know, upon the collectors of taxes and other depositaries of public moneys. By whatever casualty deprived of their property, including sums collected or received for the State, county, or municipality, these latter must be fully accounted for and paid over, even though at the time of their loss by fire, or flood, or robbery they existed in the hands of the officer in the precise form of bills or gold, &c., in which they came into his hands. (United States *v.* Prescott, 3 Howard, 587 to 589; United States *v.* Morgan, 11 Howard, 160; United States *v.* Dashiel, 4 Wall., 185; Boyden *v.* United States, 13 Wall., 21.)

Indeed, except that it is just as possible to pay these taxes now as it was when the bond was given, there is nothing to distinguish this case, in this aspect of it, from those of frequent occurrence in which parties have uni-

formly been held for the breach of their express agreement, regardless of the causes which prevented performance; as, to pay rent after the building is consumed. (Paradine *v.* Jane, Aleyn, 26; Fowler *v.* Bott, 6 Mass., 63; Leeds *v.* Cheetham, 1 Sim., 146; Lofft *v.* Dennis, 1 E. & E., 474; Brewer *v.* Herbert, 30 Md., 301; McKenzie *v.* Sterling, 48 Barb., 330, 335; Bute *v.* Thompson, 13 M. & W., 487; Davis *v.* Smith, 15 Misso., 467; Harrison *v.* North, 1 Ch. Cas., 83; and in other similar cases; Oakley *v.* Morton, 1 Kernan, 26; Harmony *v.* Bingham, 2 Kernan, 107; Kirk *v.* Gibbs, 1 H. & N., 810, where a vessel was prevented from receiving a full cargo by reason of the action of the Peruvian Government.) So if the goods are not shipped as stipulated by reason of blockade (Medeiros *v.* Hill, 8 Bing., 231), or infectious disorder (Barker *v.* Hodsdon, 3 M. & S., 267), or frost (Kearon *v.* Pearson, 7 H. & N., 386). In one case a ship-owner was held liable for a breach of an agreement to load guano at Ichaboe, when there was no guano there (Hills *v.* Sughrue, 15 M. & W., 253); and in another for not delivering tallow in fourteen days after the unlading of a vessel that failed to bring it as expected (Hale *v.* Rawson, 4 C. B., N. S., 85, 95, and 96).

The law is thus summed up by a late English author: "In short, it is admitted law that generally where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although in consequence of unforeseen accidents the performance of the contract has become unexpectedly burdensome or even impossible." (Pollock on Contracts, 331, 332.)

In this case Messrs. Farrell, Pinckney, and Smith ex-

pressly and deliberately contracted under seal to pay these taxes on or before the 13th day of June, 1871. All they contracted for was such payment. It has not been rendered impossible; at most it has become "unexpectedly burdensome," which is no defense. (U. S. *v.* Prescott, 3 Howard, 588.) The sureties would have deemed it so, if called on at all; and it is no more of a burden to the principal than if he had lost a like amount of property by some other accidental cause, or through defalcation; it may be less, because insurance can be effected against fire, but (practically) not against defalcation.

The only appearance of *special* hardship is some imaginary connection between the continued existence of the subject of taxation and of the tax thereon. If in this aspect "the plaintiff hath a pitiful case," it is "not such as this court can relieve; for the law and equity are all one in this case." (Harrison *v.* North, 1 Chan. Cas., 81.)

II.

Nor does the fact that the storekeeper was at dinner when the fire was discovered add anything of strength to the case of the plaintiffs in error.

1. As matter of fact, it is quite apparent that, had he been there, the barrels would have been rolled to a place where they would have burned; for that fate befell those which were taken out. It was only on looking the ground over afterward that it was seen that if they had been removed to a different spot the fire would not have been likely to have reached them.

2. But, as matter of law, the presence or absence of Mr. Griffin, the storekeeper, has nothing to do with the merits of this defense.

The statutes do not contemplate the incessant presence of a storekeeper at the public store, either under the customs or internal-revenue laws; especially must this be so under the latter, where provision is made for but one storekeeper to a distillery, unless the Commissioner of Internal Revenue designates more, or a night storekeeper, and the removal of spirits between sunset and sunrise is forbidden. (Act of July 20, 1868, c. 186, § 37; 15 Stats., 141, top.)

"At that time [July 27, 1870, when the fire occurred] the distillery had been shut down probably a month." (Record, 10, line 17.) It would hardly be expected of the storekeeper to be constantly upon the premises, without going away a moment, under these circumstances. The requirement of attendance during all the hours of the day is made by the government for the protection of its own interests only.

True, he had a key of the warehouse door; nevertheless, "in point of law, the owner of the spirits and the owner of the warehouse, wherein they are stored, is in possession of the spirits." * * * "All that the statute has done is to throw around his ownership, possession, custody, and control a surveillance, and a joint custody of the warehouse, as an obstacle to the accomplishment of any fraud the owner may intend and desire to effect." (U. S. *v.* 36 Bbls. High Wines, 7 Blatch., 466.)

But, when there, Mr. Griffin could only consent to and facilitate the removal of spirits in conformity with law, upon the certificate of the collector that the tax had been paid, and after stamps had been affixed. He, as "an officer of the United States, had no authority to dispense with this requirement of the law." (Hart *v.* United States, 95 U. S., 318.)

If any sudden emergency required the immediate removal of the liquors for their preservation, there was just as much justification for removing them unstamped without Mr. Griffin's presence and concurrence as with it. If the exigency justified the departure from statutory requirements, it dispensed with the necessity for his consent or action.

If the brief absence of Mr. Griffin could be deemed laches on his part, the rights of the United States would not be prejudiced thereby. Recovery could still be had on this bond. Such laches is one of the risks which a surety knowingly takes upon himself and agrees to be bound by its consequences. (Hart *v.* United States, 95 U. S., 318, and cases there cited.)

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